77-1791

Supreme Court, U. S.
FILED
JUL 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1971

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DON STOCKING
101 Simonton, Suite 201
Conroe, Texas 77301
Attorney for Respondent,
Springs Woods Bank

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Statutory and Rules Provisions Involved	2
Statement of the Case	2
Argument and Authorities	3
Conclusion and Prayer	6

LIST OF AUTHORITIES

CASES	Page
Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)	4

FEDERAL RULES OF CIVIL PROCEDURE	
Rule 15	2, 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1971

In the Matter of:
CHARLES MOORE BARDWELL, JR., ET AL.,
Bankrupts.

CHARLES MOORE BARDWELL, JR., ET AL.,
Petitioners

v.

SPRING WOODS BANK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, SPRING WOODS BANK, (hereinafter called "SPRING WOODS"), respectively prays that this Honorable Court deny a Writ of Certiorari upon the Petition of CHARLES MOORE BARDWELL and RACHEL HUGGINS BARDWELL, (hereinafter called "BARDWELL"), and let the Judgment of the United States Court of Appeals for the Fifth Circuit stand in this Cause.

STATUTORY AND RULES PROVISIONS INVOLVED

Rule 15 (c) Federal Rules of Civil Procedure, provides in pertinent part as follows:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

STATEMENT OF THE CASE

The Statement of the Case offered by Petitioner, BARDWELL, glosses over the facts that from the date that the complaint was filed, May 14, 1975 to the close of the trial, October 15, 1975, scarcely five months had elapsed, and that SPRING WOODS made its Motion For Leave To Amend one month before trial, just after the close of the depositions. The adversary action filed by SPRING WOODS was one of three such actions against the BARDWELLS, each based on the January 18, 1974 Financial Statement. SPRING WOOD'S initial complaint was based on the wrongful inclusion of the trust item, as described in BARDWELL'S statement of the case. The complaints asserted against BARDWELL in the other adversary actions alleged that the January 19, 1974 financial statement was materially false due to the trust item and further alleged that the same financial statement was false because the item "notes payable to relatives" was understated by $24,250.00. The adversary actions were not consolidated for trial by the Bankruptcy Judge, but were consolidated for discovery, which was held beginning September 3, 1975, pursuant to notice (Appendix 14-16; References to "Appendix" are to the Appendix filed in the United States Court of Appeals, Fifth Circuit, No. 77-2931.) During discovery, as later with the trial, SPRING WOODS led off and the other complainants followed, so that although SPRING WOODS finished its discovery on September 5, the other parties continued their depositions for several days. On September 15, before the depositions had been typed up, SPRING WOODS filed its Motion for Leave to Amend, together with its trial statement, seeking to amend to include the specifications of material falsity in the financial statement based on the notes on the "notes payable to relatives" item and the inquiry about prior Bankruptcies, all in the same financial statement. Four days later the Bankruptcy Court ordered that a hearing on the Motion for Leave to Amend be set for September 30, 1975, and on September 29, 1975 BARDWELL filed his objection to SPRING WOOD'S Motion for Leave to Amend. The hearing was held on September 30, 1975, and on October 10, 1975 the Bankruptcy Court, for the first time, announced its decision to overrule SPRING WOOD'S Motion to Amend and signed an order to such effect (Appendix 38). Four days later the case proceeded to trial.

ARGUMENT AND AUTHORITIES

Essentially, the Petitioner, BARDWELL, ignores the "relation back" doctrine of Rule 15 (c) F.R.C.P. quoted above, and proceeds to draw exaggerated conclusions about the effects of the rulings of the District Court and the Court of Appeals.

Both the original complaint and the amendments offered by SPRING WOODS alleged only that the

BARDWELL'S financial statement of January 18, 1974 was materially false; the amendments simply added that the item "notes payable to relatives" on the January 19, 1974 financial statement was false because BARDWELL in fact owed $24,250 more to his relatives than the financial statement had stated, and because BARDWELL had in fact initiated a bankruptcy action in 1968, contrary to his negative answer in the January 19, 1974, financial statement to the question "Have you ever taken bankruptcy?" These additional specifications clearly concerned and arose out of the same occurrence, event and transaction specified in the original petition.

BARDWELL has offered nothing to show ". . . undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc. . . .", the conditions stated in *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), as necessary to justify denying the Motion for Leave to Amend. This case took five months from the original complaint through the trial; SPRING WOODS attempted to amend in the usual course of the trial, just after the completion of deposition with its trial statement. Although SPRING WOODS knew of the allegations of the other complaints, no one can deny that SPRING WOODS was first entitled to discovery before filing its amendments about the prior bankruptcy item (BARDWELL *could* have had a good reason for the negative answer) and the "notes payable to relatives" item (BARDWELL *could* have paid off or some how discharged these debts prior to the date of the financial statement).

BARDWELL has simply not shown how these proferred amendments are outside the "relation back" doctrine of Rule 15 (c); relation back is limited by that rule to same event, occurrence and transaction of the original complaint.

Finally, all of the arguments and authorities raised in BARDWELL'S Petition for Writ of Certiorari were thoroughly considered by the District Court and by the United States Court of Appeals, Fifth Circuit, both by brief, reply brief, and motions for rehearing, filed in each court. BARDWELL has shown no conflict among the circuit court decisions which should be resolved by this court. BARDWELL still has his day left in court; the District Court opinion only remanded the cause back to the Bankruptcy Court for further trial consistent with its order and the Fifth Circuit affirmed without dissent. This Petition only delays the final trial and disposition of the case without any clear showing of any need for this Honorable Court's supervision under Rule 19, Revised Rules of the United States Supreme Court.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent, SPRING WOODS, prays that this Honorable Court deny the Writ of Certiorari of Petitioners, CHARLES MOORE BARDWELL and RACHEL HUGGINS BARDWELL and allow the decisions of the United States Court of Appeals, Fifth Circuit and the District Court, Southern District of Texas, Houston Division, to stand.

Respectfully Submitted,

DON STOCKING
101 Simonton, Suite 201
Conroe, Texas 77301
Attorney for Respondent,
Spring Woods Bank